

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2012G061

PRELIMINARY RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE

LARRY BROWN,
Complainant,

vs.

COLORADO STATE UNIVERSITY,
Respondent.

Complainant petitions the State Personnel Board (Board) to grant a discretionary, evidentiary hearing to review the appointing authority's response to his grievance. The question presented for purposes of this preliminary recommendation is whether valid issues exist which merit a full evidentiary hearing. It is the recommendation of the undersigned administrative law judge that a hearing be **denied**.

SUMMARY

Complainant, a certified employee in Housing and Dining Services at Colorado State University (CSU), filed a petition for hearing on February 3, 2012, arguing that he was denied relief in the grievance process because the grievance process was dismissed before its conclusion and that by dismissing the grievance process prematurely, CSU violated the grievance process. Complainant requests that the grievance process continue to Step 2 and that Noah Christensen be made a co-grievant on his grievance.

Respondent argues that Complainant failed to meet his burden of showing that grounds exist under C.R.S. § 24-50-123(3) and/or Board Rule 8-46, 4 CCR 801, that merit a full hearing; this Board's review of Complainant's final grievance decision is limited; the Step 1 grievance decision was not arbitrary, capricious or contrary to rule or law, nor does it violate Complainant's federal or state constitutional rights, C.R.S. § 24-34-401, *et seq.* or C.R.S. § 24-50.5-101, *et seq.*; the Step 2 grievance process was properly terminated due to Complainant's failure to comply with CSU's State Classified Employee Grievance Process (SCEGP); and Complainant's request to include another grievant in Step II of the grievance process was properly denied.

UNCONTROVERTED FACTS

The following facts were either included in both parties' information sheets, were contained in exhibits that were not disputed by either party, or were not controverted by either party:

1. Complainant is currently employed by CSU, Housing & Dining Services as a supervisor. One of his supervisees is John Farnes.
2. CSU has adopted a four-step grievance policy which describes, in relevant part, the following procedures:

a. "Any employee who is aggrieved by any action may initiate a formal grievance, not otherwise appealable, that related to his/her working conditions, relationships, or agency policies, rules, or regulations..."

b. "Step 1: The first step in the formal grievance procedure is an information discussion (initiated by the employee within 10 calendar days of the incident or knowledge of the incident by the employee) between the employee and the person involved in the incident that gave rise to the dispute. ... The employee shall be informed in writing of the decision within 7 days after the discussion. If a timely decision is not issued, the employee may proceed to Step 2."

c. "Step 2: If the informal discussion fails to resolve the employee's concerns, the employee has five days after receipt of the informal decision to file a written statement of grievance with the superior of the person with whom the employee had the discussion at step one.... Only the issues set forth in the written grievance shall be considered thereafter... The Step 2 official shall schedule a conference with the parties within 3 working days after receiving the written grievance. A written decision shall be provided within 3 working days of the conclusion of the conference(s). The written decision at this level shall be binding unless the employee requests that the matter be reviewed at Step 3."

d. "Step 3: Requests for Step 3 review shall be made in writing within 3 working days of the receipt of the decision at Step 2 and shall be filed with the appropriate Dean (for employees in Academic Colleges and the Graduate School) or the appropriate Vice President for employees in other units. The appropriate Dean or Vice President shall, within 3 working days of receipt of the grievance, select a person or committee to review the grievance... A written decision shall be rendered within 5 working days after the conclusion of the conference(s). The written decision shall be binding unless the employee elects to request that the matter be reviewed at Step 4."

e. "Step 4: A written request for a Step 4 review should be filed with the appropriate Dean or Vice President within 3 working days after receipt of the Step 3 decision. The Dean or Vice president shall schedule a conference(s) with the parties within 5 working days of receipt of the Step 4 request. A written decision shall be provided to the employee within 7 working days of the conclusion of the conference(s). The Step 4 decision shall be the final decision of the University."

f. "An employee may petition the State Personnel Board to hear an appeal of the University's final decision within 10 days of receipt of the Step 4 decision..."

3. Complainant alleges that, on October 5, 2011, he, Mr. Christensen, and Mr. Farnes were in the Edward's Hall Bakeshop to review progress of a work order.

4. Complainant alleges that Mr. Farnes intentionally hit or bumped Mr. Christensen in the shoulder three times. Complainant witnessed only one of the bumps.

5. The CSU Police Department was contacted to investigate this incident and issued a report on October 25, 2011. Officer Samuel Hausman conducted the investigation. The investigation consisted of speaking to Mr. Christensen, Complainant, a student hourly worker Rachel Couch, Mr. Farnes, the bake shop supervisor Joan Smith, and eight bake shop employees who worked in the vicinity of the incident.

6. Officer Hausman closed the narrative of the report with these conclusions:

In conclusion, I think that the fact that none of the unbiased bake shop employees present at the time and location of the alleged incident observed any of the alleged disturbance creates enough reasonable doubt that the statements provided to me by Christiansen, Brown, and Couch do not rise to the level of probable cause that a criminal offense took place. Therefore, I will not be charging Farnes with Harassment.

However, due to the voice, tone, feelings, and accusations presented in my separate interviews of Christensen, Brown, and Farnes, I do feel that the history of events between these parties has led to a volatile working relationship. It seems that Christensen and Brown let the prior events influence their interactions with Farnes in an unprofessional manner. It also seems that these same events led Farnes to interact with Christensen and Brown in an unprofessional and insubordinate manner. Their shared office area seems to have become a hostile working environment and continued interactions are likely to continuously escalate. I recommend that Risk Management and Human Resources consider resolving the matter through alternative assignments.

7. Tracy Hutton with CSU Human Resource (HR) Services also conducted an investigation and advised Dr. James Dolak that, after completing this investigation, she did not feel the incident warranted disciplinary action against Mr. Farnes.

8. On December 15, 2011, Complainant sent an e-mail to Lewis Sutphin, Operations Management Director, CSU Housing & Dining Services, requesting a Step 1 informal discussion which allegedly was in accordance with the SCEGP.

9. The issues for discussion included:

- a. The results of an incident between Complainant, Noah Christensen, and John Farnes on October 5, 2011;
- b. Alleged misrepresentations/omissions contained in the CSU police report regarding the October 5, 2011 incident;
- c. Alleged repeated lack of corrective or disciplinary action taken against John Farnes;
- d. Alleged repeated unaddressed accusations of abuse, cover ups, and false statements made over a long period of time by John Farnes toward Complainant and Noah Christensen;
- e. The impact/effect of John Farnes on the working conditions and relationships with peers, co-workers, and staff on the CSU campus;
- f. The alleged issues leading to and creating a hostile work environment;
- g. The alleged omission of additional incidents from the disciplinary letter to John Farnes that were allegedly presented to Human Resources prior to Farnes' Rule 6-10 meeting;

- h. The alleged false premise that there are communication issues;
- i. Possible reasons for the alleged hostile work environment that have not been addressed.

10. Mr. Sutphin reviewed Complainant's December 15, 2011 e-mail and was concerned about meeting the grievance timelines due to the Christmas and New Year's holidays. Therefore, he suggested that he and Complainant meet on January 3, 2012, for the informal Step 1 grievance meeting.

11. In a December 19, 2011 e-mail, Complainant agreed with Mr. Sutphin's suggestion. Complainant did not state whether any other grievant, including Noah Christensen, wished to be involved in this meeting.

12. On January 3, 2012, Complainant met with Mr. Sutphin for an informal Step 1 grievance meeting. During this meeting, Complainant stated that beginning in January 2010, the splitting of the Mechanical/Electrical shop into the Dining Zone and Project Zone triggered some employee frustration due to the different expectations of the two new work units.

13. Complainant stated during the meeting that many of the changes instituted were met with resistance by employees, particularly John Farnes. Additionally, Complainant stated that Mr. Farnes strongly resented the selection of Noah Christensen as the Dining Zone supervisor and began to exhibit unprofessional behaviors and experience performance issues.

14. According to Complainant, Mr. Farnes displayed an increasing amount of hostility toward Complainant and Mr. Christensen. As a result, a "Violence in the Workplace" session was provided to Complainant's work group on April 20, 2011.

15. Additionally, Complainant stated during the informal grievance meeting that prior to October 5, 2011, Mr. Farnes told a customer that Mr. Christensen had made derogatory comments about the customer.

16. During the January 3, 2012 informal grievance meeting, Complainant stated he was concerned that if there was no documented record of Mr. Farnes' actions, then any recurrence of similar behavior would be treated as a first-time occurrence. Complainant's primary complaints during the informal grievance meeting were the performance, behavior, and insubordination of his employee, Mr. Farnes. Complainant wanted a corrective action to be issued to Mr. Farnes for the October 5, 2011 incident.

17. Mr. Sutphin, in his January 10, 2012 written Step 1 grievance decision, stated that the responsibility of managing the performance of employees lies with the supervisor and that it was ultimately Complainant's decision to issue a corrective action to Mr. Farnes. Additionally, Mr. Sutphin stated that the CSU police report would be a part of Mr. Farnes' permanent record and that Mr. Farnes had been given a verbal warning by Dwight Burke regarding his behavior.

18. With regard to Complainant's disagreements with the comments contained in the CSU police report, Mr. Sutphin stated in his January 10, 2012 written Step 1 grievance decision that the matter should be addressed directly to the CSU Police Department.

19. Complainant and Mr. Christensen submitted a Step 2 written grievance to their appointing authority, Dr. Dolak, on January 13, 2012. The issues that Complainant covered in

his formal written complaint of January 13, 2012, included: the October 5, 2011 incident at the Edward's Hall Bakeshop; disagreements with the comments contained in the CSU police report; Mr. Farnes' motor vehicle accident on July 25, 2011, in which two tickets issued to Mr. Farnes were allegedly torn up; and the poor working conditions and working relationships caused by several employees in the Project Zone and Dining Zone.

20. Pursuant to SCEGP, Complainant was contacted by Terri Rogakis on January 19, 2012, within three working days of his Step 2 written grievance, to schedule the Step 2 grievance meeting. This meeting was scheduled on January 26, 2012, with Dr. Dolak.

21. On January 23, 2012, Ms. Hutton advised Complainant that there did not appear to be an issue in Complainant's Step 2 request that could be addressed through the grievance process. Ms. Hutton stated:

As a point of clarification, I am not responding to the concerns raised in your complaint (i.e., providing a grievance response). I am advising on the CSU grievance process, which indicates that an employee should initiate an informal discussion within 10 days of the incident or knowledge of the incident between the employee and 'the person involved in the incident that gave rise to the dispute.' Based on my review of the information you submitted most of the issues you've raised are not actions initiated by Lew. For instance, you reference the exclusion of certain pieces of information from John Farnes' disciplinary action. Disciplinary actions are only 'appealable' by the impacted employee, not by any other concerned individuals. Secondly, if you were able to grieve this matter, you would initiate a discussion with me, as this is solely my decision and I make the determination as to what factors to include and exclude from the final decision. Similarly with your concerns regarding CSU-PD. Yes, they are CSU employees and if you have a concern regarding comments made by an officer, you could have addressed that with that individual. Also, most of the issues you've brought forward are not timely; many date back to 2010. While you may consider them relevant to your current situation, your opportunity to grieve the issue has elapsed. However, as I indicated previously, if there were issues raised during your discussion with Lew which involve a timely dispute of actions that he took, you can submit information regarding those actions as a grievance. I'm certain that Dr. Dolak will allow for an extension of the timeline to allow you that opportunity. Additionally, there may be opportunities to discuss within the department the various concerns that you have but those conversations do not constitute a grievance.

22. Ms. Hutton provided Complainant with appeal rights and told him if he disagreed with her decision, he could pursue a review by the Personnel Director by filing an appeal within 10 days.

23. Ms. Hutton then advised Dr. Dolak to cancel the Step 2 grievance meeting. Ms. Hutton's January 23, 2012 email, accordingly, is the final agency decision on review in this case.

24. Complainant was also advised by Ms. Hutton that because Mr. Christensen did not participate in the Step 1 grievance meeting, he could not thereafter join Complainant's grievance process.

25. Although the Step 2 grievance process was terminated, Complainant met with Dr. Dolak and Wendy True on January 26, 2012, to discuss the issues raised in Complainant's January 13, 2012 Step II written grievance.

26. On January 31, 2012, Complainant appealed Ms. Hutton's decision to dismiss his grievance to the Board.

27. The matter was set for preliminary review and both parties timely filed information sheets.

COMPLAINANT'S CONTENTIONS

As relief, Complainant requests that a hearing be granted. If the hearing is granted, Complainant offers to prove the following allegations at hearing:

1. The decision of the University to terminate/abort the Grievance process was not only arbitrary and capricious, but is also contrary to Board Rules identified below, and the SCEGP.

2. The purpose and scope of this Information Sheet is limited to Complainant's effort to request reversal of the University's decision to terminate/abort the grievance process. His understanding is the discussion about the actual grievance issues is not within the scope of this Preliminary Review.

3. All documents have already been submitted with the Colorado State Personnel System Consolidated Appeal/Dispute Form, on January 31, 2012, and a copy was sent to Respondent.

4. As explained to Tracy Hutton and James Dolak, in an email dated January 25th, 2012, at 12:37 pm, and attached to Complainant's Consolidated Appeal/Dispute form, the date of the incident "that gave rise to the dispute" was December 7, 2011.

5. Per the SCEGP, the request for an informal discussion must be initiated by the employee within 10 days. The date of the incident that gave rise to the grievance is December 7, 2011. The request for the informal Step 1 meeting was December 15, 2011, as evidenced by the email dated December 15, 2011, at 3:57 pm.

6. As Complainant stated in the email; "The meeting is to discuss the issues and events surrounding John Farnes, and other issues that were brought to Noah's and my attention during the meeting with the three of us on the afternoon of Wednesday Dec 7, 2011 (less than 10 days)."

7. During a meeting with Wendy True (Housing and Dining Services HR), on December 5, 2011, Wendy stated that, based on the information in the Police Report, Tracy Hutton decided not to take disciplinary action about the Bakeshop incident. The Police Incident Report was a critical document in the decision making process, and was relied upon by many to be factual and a true representation of the events that day on October 5th, 2011.

8. The Police Report issues were identified in Complainant's request for a Step 1 Informal meeting in the email dated December 15, 2011, and included/detailed in the "Statement of Grievance" page # 2.

9. Lew Sutphin contacted Complainant to have a meeting with him and Noah. On December 7, they found out several details about what had elapsed and some information about what was contained in the Police Report investigation after the October 5th incidents. Lew obtained a copy of the Police Incident Report # 11-2582 and handed Noah and Complainant a copy on December 8th.

10. Further information about the Parmelee Kitchen/Bakeshop incident did not surface until a meeting held on December 21, 2011, with Tracy Hutton, Mr. Sutphin and Complainant. Ms. Hutton stated that she notified James Dolak that the Bakeshop incident did not warrant disciplinary action but a Corrective Action Letter or a Letter of Expectations could be issued. This was new information for Mr. Sutphin as well.

11. Because of the Christmas/New Year's holidays, the Informal Step 1 meeting was scheduled by mutual agreement for January 3, 2012. Mr. Sutphin stated he would find out about the police department contact information for the Step 1 meeting.

12. In Mr. Sutphin's Step 1 written response he indicated the proper contacts for the CSU Police Department (PD) would be Jason Miesner or Frank Johnson. Complainant then contacted Lieutenant Frank Johnson and Lieutenant Scott Harris who both stated the PD does not follow the CSU SCEGP. Complainant's only formal written option was to file a "Formal Written Complaint" with the PD; it would not have mattered what date he contacted the PD, since they do not follow the SCEGP.

Legal Argument

13. Libel is the written form of defamation. The 1965 Restatement (Second) of Torts § 8A states "A person has an interest in his or her reputation and good name." The Police Incident Report # 11-2582 contains Officer Hausman's personal opinions, as stated by Sgt. Turner as contained in the email on the appeal.

14. According to the State Personnel Board Rules:

- 1-8. paraphrased: Presidents of institutions of higher education may delegate human resource functions...
- 1-11. paraphrased: All appointing authorities, managers, supervisors are accountable for compliance with these rules...
- 1-40. paraphrased: Department is an institute of higher education.
- 6-1. paraphrased: Employees represent the State so they are required at all times to... be courteous and impartial...
- 8.3 paraphrased: If the complaining party is an employee in the same department, the grievance procedure adopted by the department, or if none, as provided in this chapter is to be used.

15. Based on the Board Rules, the timeliness of the filing of the Grievance, and the SCEGP, the University's decision to terminate/abort the grievance process was arbitrary and capricious and contrary to rule or law.

16. The effort by Tracy Hutton to confuse the issues of the grievance and the time periods referenced in the grievance was attempted to be clarified to Tracy Hutton and James Dolak in the email dated January 25, 2012 at 12:37 pm, to no avail.

17. The following is the argument why the petition for hearing was filed: "Noah Christensen excluded from Grievance." Complainant seeks the relief as: "Reinstate Noah Christensen as grievant number 2."

18. Board Rule 8-8. paraphrased as: The University (Department) shall establish a process that complies with the following requirements.

19. There are many issues/conflicts/problems with the CSU SCEGP attached to the appeal documents.

20. The flowchart does not comply with or is not coordinated with the grievance written instructions, as follows:

- There is no identification of calendar days or business days in at least twelve steps on the flowchart.
- There is no time requirement specified in Step 1 written instructions, from the date of the employee notification, to the schedule of the Step 1 informal meeting.
- There is not a discussion regarding multi-party grievants and the requirement for all multi-party grievants to be present at any/every step of the process, whether a formal or during the informal Step 1 meeting.
- The written instruction for Step 2 states: "The Step 2 official shall schedule a conference within 3 working days after receiving the written grievance." The flowchart states: "Scheduled within 3 days of receipt."
- There's conflict between the flowchart and written instructions for Step 3.
- The written instructions say, "within 3 working days of receipt of grievance, select a person or committee..." "The person or committee selected shall, within 3 working days of the receipt of the grievance from the dean or Vice president, schedule a conference(s) with the parties." This equals 6 days.
- The flowchart states "Scheduled Within 5 Days of Receipt."
- There is a second conflict between the flowchart and written instructions for Step 3: written instructions specify 5 working days; the flowchart states: "7 Days after Discussion."
- The flowchart deviates off to a secondary right side column & states "Optional Step 3."
- The Written Instructions for Step 3 mandate by the use of the word "shall" to select a person or committee.
- The Step 3 arrows diverting between the left flow path and the "Optional" secondary right column are confusing. After completing the "optional"

flowchart path the second arrow directs you back up the starting Step 3 block.

- The Step 4 flowchart steps are omitted.

21. Noah Christensen is the victim or recipient of the disrespectful statements and acts of physical intimidation, during the time period of April 2011 through October 5, 2011.

22. Noah Christensen was at the meeting with Lew Sutphin on December 7, 2011, when the issues of the "Statement of Grievance" were revealed to both Noah Christensen and Complainant. Noah Christensen discussed filing of a grievance at that time.

23. Because of the Christmas/New Year's holidays and many leave days taken during this time period and Noah was on pre-scheduled, pre-approved leave during the scheduling of the Step 1 Informal meeting and was not present for the Step 1 Informal meeting.

24. Noah did sign the original "Statement of Grievance" Section 1 page # 46, which was also the "Formal Written Complaint" filed with CSU PD, dated January 13, 2012.

25. Noah did sign the original "Grievance Form" dated January 13, 2012.

26. SCEGP is confusing enough, with all the issues/conflicts/problems identified above. An employee should not have to be a lawyer or retain a lawyer to understand the CSU Employee Grievance Process.

27. The department knew Noah Christensen was on leave during this time period as they know the leave status of all employees, as this is tracked at the Operations Management Customer service dispatch office. At no time did anyone warn that Noah Christensen would be excluded if he was on Leave during this Informal meeting.

28. In addition to reinstating Noah Christensen as Grievant # 2, Complainant requests that the SCEGP be reworked and rewritten to be understandable by those who would need to use it to correct all conflicts, omissions, and problems.

29. Based on the State Personnel Board Rules, the requirement is for the University to comply with the Board Rule 8-8.

30. There are problems with the confusing contradictory instructions in the flowchart compared to the written instructions.

31. Board Rule 8-1. "Disputes should be resolved at the lowest level." The purpose of the Grievance process is to resolve the problems that arise.

32. How does excluding the alleged "victim" resolve anything?

33. The University's decision to exclude Noah Christensen and deny him the grievance process was arbitrary and capricious and contrary to rule or law.

34. In his Reply to Respondent's Information Sheet, Complainant responds with regard to Respondent's witnesses, as follows:

- A. Regarding witnesses Lew Sutphin and Tracy Hutton and meetings of December 7, 2011; December 21, 2011; and January 3, 2012, Complainant states that he has an audio recording of the meetings which are, along with emails submitted to the Board, "the entire discussions regarding the Grievance with these witnesses."
- B. Regarding witnesses Wendy True and James Dolak and the January 26, 2012 meeting, Complainant again states that he has an audio recording of the meeting which is, along with emails submitted to the Board, "the entire discussions regarding the Grievance, with these witnesses."
- C. Regarding witness Terry Rogakis, Complainant states that Noah Christensen and Complainant delivered the "Statement of Grievance" on January 13, 2012, which is, along with emails submitted to the Board and a phone call, "the entire discussions regarding the Grievance, with these witnesses."
- D. Regarding witness Bill McBride, Complainant states that Mr. McBride was not in attendance at any of the informal grievance meetings or other discussions during the grievance process and is not present on all meeting audio recordings.

RESPONDENT'S CONTENTIONS

As relief, Respondent requests that Complainant's petition for hearing be denied, as Complainant has failed to meet his burden of showing that valid issues exist that merit a full hearing. Respondent offers to prove the following allegations at hearing:

Legal Argument

I. This Board's review of Complainant's final grievance decision is limited.

1. Section 24-50-123(3), C.R.S. limits this Board's review of an agency's final grievance decision by authorizing this Board to grant a petition for hearing only if the decision of the appointing authority violates an employee's federal or state constitutional rights, § 24-34-401, C.R.S. *et seq.*, § 24-50.5-101, C.R.S. *et seq.*, or the agency's grievance procedures. Board Rule 8-49 provides that the Board can reverse or modify an agency action that is the subject of a petition for hearing if the action is found to be arbitrary, capricious, or contrary to rule or law, in addition to the grounds listed in § 24-50-123, C.R.S.

II. The Step 1 grievance decision was not arbitrary, capricious or contrary to rule or law, nor does it violate Complainant's federal or state constitutional rights, § 24-34-401, C.R.S. *et seq.* or § 24-50.5-101, C.R.S. *et seq.*

2. To determine whether an appointing authority's decision is arbitrary or capricious under the standard set forth in *Lawley v. Dept. of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001), this Board must determine whether the appointing authority:

- Neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it;

- Failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or
- Exercised its discretion in such a manner after a consideration of the evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions.

3. Mr. Sutphin's decision meets the *Lawley* standard. Mr. Sutphin used reasonable diligence and care in reviewing the evidence before him prior to making a decision. He gave candid and honest consideration of the evidence before him, and he exercised his discretion based on the evidence before him.

4. On December 15, 2011, Complainant grieved the actions, behavior, and insubordination of his employee, John Farnes. Additionally, he grieved the alleged inaccuracies in the police report issued by the CSU Police Department regarding an incident that took place on October 5, 2011, involving Complainant, Noah Christensen, and Mr. Farnes. Finally, Complainant grieved the disciplinary actions (or lack thereof) taken against Mr. Farnes. Complainant and Lewis Sutphin participated in a Step 1 Grievance meeting on January 3, 2012. Mr. Sutphin issued a written grievance decision on January 10, 2012, finding that any disagreements Complainant had regarding comments contained in the CSU Police Department's report should be addressed directly to the CSU Police Department. Additionally, Mr. Sutphin advised Complainant that the responsibility of managing the performance of employees lies with the supervisor. Therefore, Complainant, as a supervisor, was advised to address unprofessional and disruptive behavior in the workplace.

5. Additionally, Respondent's decision to terminate the Step 2 grievance process meets the *Lawley* standard. On January 13, 2012, Complainant filed a Step 2 written grievance requesting, among other things, that certain statements from the CSU Police Department report be retracted, that this retraction be posted in several locations, and that Mr. Farnes be issued a corrective action. Complainant's initiation of the grievance process did not comply with CSU's State Classified Grievance Procedure.

6. Complainant was contacted by Tracy Hutton on January 23, 2012, and was advised that there did not appear to be an issue that could be addressed through the grievance process. Specifically, Complainant failed to initiate Step 1 of the grievance process with the "person involved in the incident that gave rise to the dispute," the actions taken by the CSU Police Department were not within Mr. Sutphin's control, the decision whether to discipline Mr. Farnes was the decision of Ms. Hutton, and the incidents referred to in Complainant's Step 2 written grievance were untimely. Ms. Hutton therefore advised Dr. Dolak, the appointing authority, to cancel the January 26, 2012 Step 2 grievance meeting. Although the Step 2 grievance process was terminated, Complainant ultimately met with Dr. Dolak on January 26, 2012, to discuss the issues raised in his Step 2 written grievance. Because Complainant failed to comply with Respondent's SCEGP, as discussed below, Complainant's request to reinstate the grievance process should be denied.

III. The Step 2 grievance process was properly terminated due to Complainant's failure to comply with the SCEGP.

7. Pursuant to Board Rule 8-8, the grievance process is designed to address and resolve problems. Each department is required to establish a process that complies with the requirements set forth in Board Rule 8-8.

8. CSU established the SCEGP as well as a chart detailing the SCEGP. According to the first step of CSU's formal grievance procedure, there must be "an informal discussion . . . between the employee and the person involved in the incident that gave rise to the dispute."

9. After learning about the results of the CSU Police Department investigation regarding the October 5, 2011 incident involving Mr. Farnes, Mr. Christensen and Complainant as well as Ms. Hutton's decision that Mr. Farnes should not be disciplined, Complainant initiated Step 1 of the grievance process with Lewis Sutphin. This was improper as Step 1 requires an informal discussion between Complainant and ***the person involved in the incident that gave rise to the dispute***. Complainant's underlying dispute is with the actions, behaviors, and insubordination of Mr. Farnes – this is the basis of Complainant's dispute. Mr. Sutphin was not involved in any incident that gave rise to the dispute and therefore, it was improper for Complainant to begin the grievance process by holding an informal grievance meeting with Mr. Sutphin.

10. Pursuant to Step 1 of CSU's State Classified Grievance Procedure, Complainant should have initiated an informal discussion with Mr. Farnes. Thereafter, if the informal discussion failed to resolve the employee's concerns, Complainant could proceed to Step 2 and "file a written statement of grievance with the superior of the person with whom the employee had the discussion at step one."

11. Additionally, even if the bases of Complainant's dispute were the alleged inaccuracies in the CSU Police Department report, the failure to take disciplinary action against Mr. Farnes, or the failure to administer progressive discipline, these actions were by the CSU Police Department and Ms. Hutton. Mr. Sutphin was not involved in these actions and therefore, it was improper for Complainant to begin the grievance process with an informal grievance meeting with Mr. Sutphin. Complainant's actions have violated Step 1 of the CSU State Classified Grievance Procedure.

12. Many of the issues and incidents Complainant describes in Step 1 and Step 2 of the grievance process are also untimely. According to Step 1 of the SCEGP, Complainant is required to initiate Step 1 of the grievance procedure "within 10 calendar days of the incident or knowledge of the incident by the employee." The incidents listed by Complainant occurred more than 10 days prior to his December 15, 2011 Step 1 grievance. Specifically, Complainant lists the October 5, 2011 incident with Mr. Farnes in the Edward's Hall Bakeshop; the July 25, 2011 incident in which Mr. Farnes was ticketed by the CSU Police Department and the tickets were allegedly torn up; and other disruptive incidents by Mr. Farnes and other employees prior to December 2011. Complainant alleges that these incidents have created a difficult work environment; however, these incidents all took place more than 10 days prior to December 15, 2011. Therefore, any grievance regarding these incidents is untimely pursuant to the SCEGP. Because Complainant failed to comply with the SCEGP, Complainant's request to reinstate the grievance process should be denied.

IV. Complainant's request to include another grievant in Step II of the grievance process was properly denied.

13. In his Information Sheet, Complainant alleges that the chart outlining the SCEGP does not comply or is not coordinated with CSU's grievance policy. However, Complainant fails to allege how he was prejudiced by any alleged discrepancies between CSU's grievance process chart and the written grievance procedure. Additionally, many of the discrepancies alleged by Complainant involve Steps 3 and 4 of the grievance process and have no applicability in this matter.

14. Complainant asserts that there is no discussion in the SCEGP regarding multiple parties to a grievance and the requirement for all parties to be present at every step of the process. Although there is no specific language regarding the process to be followed in the event there are two or more employees grieving the same incident, the SCEGP still must be followed by every grievant.

15. Step 1 of the grievance procedure requires that an informal discussion be "initiated by the employee within 10 calendar days." Although Complainant initiated the Step 1 informal discussion, Mr. Christensen did not. **Every** employee is required to initiate the formal grievance procedure. By failing to initiate the grievance process at Step 1, Mr. Christensen cannot now join Complainant in the grievance process at Step 2. Mr. Christensen did not join in Complainant's request to Mr. Sutphin for a Step 1 informal discussion, Complainant did not request that the Step 1 informal discussion include Mr. Christensen, and Complainant did not request that the Step 1 informal meeting take place after Mr. Christensen returned from leave. Therefore, Complainant's request to include Mr. Christensen as a second grievant in this grievance process should be denied.

16. If a hearing were granted, DOC would call the following witnesses:

A. Lewis Sutphin, Operations Management Director, Colorado State University, Housing & Dining Services, will testify concerning his communications with Complainant, his involvement in the grievance process, his decision to deny the relief requested by Complainant, and any other matter relevant to this appeal.

B. Tracy M. Hutton, Human Resource Services, Colorado State University, may testify concerning her communications with Complainant, her involvement in the grievance process, and any other matter relevant to this appeal.

C. Wendy True, Human Resource Services, Colorado State University, may testify concerning her communications with Complainant, her involvement in the grievance process, and any other matter relevant to this appeal.

D. Jim Dolak, Executive Director, Colorado State University, may testify concerning his communication with Complainant, his involvement in the grievance process, and any other matter relevant to this appeal.

E. Terri Rogakis, Executive Assistant, Colorado State University, Housing & Dining Services, may testify concerning her communication with Complainant, her involvement in the grievance process, and any other matter relevant to this appeal.

F. Bill McBride, Assistant Director, Colorado State University, Housing & Dining Services, may testify concerning his communication with Complainant, his involvement in the grievance process, and any other matter relevant to this appeal.

G. Any witness endorsed by Complainant, including Complainant himself.

H. Any witness necessary for impeachment or rebuttal.

17. If a hearing were granted, DOC would offer the following exhibits:

A. Consolidated appeal/dispute form.

B. Cover letter for consolidated appeal/dispute form.

C. E-mails to and from Complainant.

D. Grievance form.

E. E-mails to and from Complainant.

F. State classified employee grievance process.

G. State classified grievance procedures.

H. Statement of grievance.

I. CSU Police Department incident report.

J. Statement of grievance – rebuttal.

K. Statement of grievance – formal written complaint.

L. Statement of grievance – response to Step 1 meeting.

M. E-mails to and from Complainant.

N. Any exhibit endorsed by Complainant;

O. Any exhibit necessary for impeachment or rebuttal;

P. Any demonstrative exhibit that may assist any witness or the ALJ.

18. As relief, CSU respectfully requests that this Board deny Complainant's petition for hearing and deny Complainant's request for relief.

DISCUSSION

The Board may use its discretion to grant a hearing for actions that do not adversely affect a certified employee's current base pay, status, or tenure, and where the employee does not have a right to a hearing, appeal, or review by law or rule. Board Rule 8-46, 4 CCR 801. The Board's authority to review the grievance decision of an appointing authority is limited by state statute. Under C.R.S. § 24-50-123(3), "[t]he Board may grant the petition only when it appears that the decision of the appointing authority violates an employee's rights under the federal or state constitution, part 4 of article 34 of this title, article 50.5 of this title, or the grievance procedures adopted pursuant to subsection (1) of this section." *Id.* This statute limits the Board's review to matters presenting a constitutional issue, an alleged violation of Colorado's Anti-Discrimination or Whistleblower Acts, or an alleged violation of the Board's or agency's rules governing grievance procedures.

The sole basis for Complainant's appeal is his allegation that the decision to terminate the grievance process and to exclude Mr. Christensen from the grievance process violated the applicable grievance procedures.

Respondent has adopted a four-step grievance process in its official grievance policy. This grievance policy meets or exceeds the standards set forth in Board Rule 8-8, 4 CCR 801. Respondent is, accordingly, obligated to follow the procedure as that procedure is described in its policy.

Respondent's process substantially complies with, but is not identical to, a flow sheet description of that process which has also been provided to Complainant. Complainant emphasizes the differences between the flow sheet description and the agency's policy. These differences, however, do not create an actionable issue here. Complainant has not been denied a grievance decision because of any discrepancy between the flow sheet and the official policy.

Instead, Complainant was denied the full grievance process because of the nature and timing of his grievances. That denial was triggered by Ms. Hutton. For the Board's purposes, therefore, Ms. Hutton's email of January 23, 2012, constitutes the final decision of the University on appeal. The specific issue is whether that denial constituted a violation of the agency's grievance policy.

Ms. Hutton expressed four ideas in her email of January 23, 2012.

First, she noted that Complainant's disagreement with the CSU police report was not something that he should grieve to Mr. Sutphin, given that Mr. Sutphin had no supervision over the police department. This objection is a correct statement about the scope of the grievance process. Whether the objection is couched as a grievance or as a request to for the police department to amend its report, the sub-agency responsible for evaluating that request would be within the police department and not within Complainant's chain of command. It was not an error for Ms. Hutton to dismiss a portion of Complainant's grievance because such a request was misdirected.

Second, Ms. Hutton dismissed the grievance process because she construed Complainant's issues to include a grievance concerning the imposition of discipline, and only the individual who received the discipline could grieve that issue under Respondent's policy. This argument is not supported by the grievance filed by Complainant. Complainant was attempting to grieve the failure to impose discipline, and not the imposition of discipline. A failure to impose discipline upon another employee, however, is still not the type of action which is grievable under the University's policy. That policy does not place many limitations on what can be grieved, but does require that the grievance "[relate] to his/her working conditions, relationships, or agency policies, rules, or regulation." The decision of Complainant's chain of command not to impose discipline against another employee is not sufficiently related to Complainant's working conditions, relationships, or agency policies, rules or regulations to be included within the scope of the grievable actions allowed under the grievance policy. Ms. Hutton's conclusion that Complainant could not grieve the issue of discipline against Mr. Farnes is well-supported by Respondent's grievance policy.

Ms. Hutton also objected to the timing of the grievance, given that Complainant was including incidents from much further back than 10 days prior to his filing. Complainant argues that he filed his grievance within ten days of learning from Mr. Sutphin on December 7, 2011, that information in the police report had been influential in the decision not to discipline Mr. Farnes, and that the grievance was therefore timely. Complainant's argument misconstrues the nature of Ms. Hutton's concern. Complainant's Step 2 grievance statement incorporated nearly 100 pages of supporting documentation and argument. The paperwork references numerous events involving Mr. Farnes, Mr. Christensen, and Complainant. Ms. Hutton's point in her email

was that the time to grieve those individual incidents had passed. This point is valid. To the extent that Complainant intended to grieve incidents which had occurred prior to December 7, 2011, his grievance was untimely as to those older events or actions.

Finally, Ms. Hutton allowed that, if Complainant was grieving Mr. Sutphin's decisions or actions as of December 7, 2011, such a grievance would fit within the grievance policy:

However, as I indicated previously, if there were issues raised during your discussion with Lew which involve a timely dispute of actions that he took, you can submit information regarding those actions as a grievance. I'm certain that Dr. Dolak will allow for an extension of the timeline to allow you that opportunity. Additionally, there may be opportunities to discuss within the department the various concerns that you have but those conversations do not constitute a grievance.

In the final analysis, Ms. Hutton's email of January 23, 2012 correctly removed issues which were not within the scope of the grievance policy, were misdirected to the wrong entity, or were too old to be properly raised in such a process. She offered Complainant a chance to focus his grievance on issues which could be grieved under the policy, such as the decision communicated, or actions taken, by Mr. Sutphin on December 7, 2011. Complainant did not take her up on that offer to reform his grievance. There was no violation of the applicable grievance procedures in Ms. Hutton's decision to terminate the process under such circumstances.

Complainant's other request to include Mr. Christensen as a co-grievant is also not supported by the rules. There is no prohibition against two employees working together to present similar grievances challenging actions that "relate to [his] working conditions, relationships, or agency policies, rules, or regulation." If Mr. Christensen's grievance is not answered to his satisfaction, however, it would be Mr. Christensen's decision as to whether to appeal the matter. As a result, while two employees may informally be considered to be co-grievants and have their grievances considered at the same time, those two employees are individual grievants under the rules. Any appeal of Mr. Christensen's grievance must be pursued by Mr. Christensen, and does not constitute a reason to grant a hearing to Complainant.

It is clear from the filings that Complainant is deeply frustrated with the lack of response from Mr. Farnes' appointing authority over what he considers to be continued bad behavior by Mr. Farnes. Complainant wants Mr. Farnes to be sanctioned in a manner that Complainant does not have the authority to impose. The police department, the HR department, and Mr. Farnes' appointing authority, however, have not agreed that there are issues here for which Mr. Farnes should be disciplined. Their reluctance to support Complainant's point of view as to the proper course of action is not, at its heart, a grievable event for Complainant. Complainant will need to make use of the other supervisory tools at his disposal, such as issuing Mr. Farnes a corrective action, addressing the issues with Mr. Farnes in other ways, or convincing his superiors that the problem is as he sees it. In any event, this matter does not pose the type of problem that the Board is equipped to resolve through evidentiary hearing.

Under such circumstances, there has been no showing of a denial of the grievance rules which apply to this case. Complainant has failed to meet his burden of showing that grounds exist under C.R.S. § 24-50-123(3) or Board Rule 8-46, 4 CCR 801, that merit a full hearing.

RECOMMENDATION

For the foregoing reasons, it is the preliminary recommendation of the undersigned administrative law judge that Complainant's petition for hearing be denied.

Dated this 25th day
of April, 2012,
Denver, Colorado.



Denise DeForest
Administrative Law Judge
State Personnel Board
633 – 17th Street, Suite 1320
Denver, CO 80202-3640
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 26th day of April, 2012, I electronically served true copies of the foregoing **PRELIMINARY RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Larry Brown

[REDACTED]

Heather Smith A.A.G.

[REDACTED]

[REDACTED]

Woods, Andrea